The foregoing facts constitute the only acts upon which Defendants FARINELLA and DARA were found guilty of Counts II and III. The remainder of the testimony constituting the majority of the trial testimony related to acts alleging conspiracy and to events which occurred the next day and later on, concerning charges of which Defendants FARINELLA and DARA were acquitted.

FEDERAL JURISDICTION

Federal jurisdiction in the first instance was based upon an alleged violation of the Hobbs Act, 18 U.S.C.A. 1951.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

IS THE HOBBS ACT, 18 USCA 1951, VIOLATED BY ROBBERY OCCURRING AFTER THE MOVEMENT OF ARTICLES IN COMMERCE HAS TERMINATED?

No violation of the Hobbs Act results from robbery of funds occurring after movement of articles in commerce has terminated. In affirming the decision of the lower court, the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, and has so far departed from the accepted and

usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The Hobbs Act and its violations are to be narrowly construed. U. S. v. **Critchley**, 353 F.2d 358 (3d Cir. 1965).

In order to prove a Hobbs Act violation by robbery, it is necessary to prove both a robbery and an effect on commerce. **Stirone** v. U. S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252, (1960).

Robbery is defined in the Hobbs Act as:

18 USCA 1951(b)(1)

> "The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining."

In **United States** v. **Nedley**, 255 F.2d 350 (3d Cir. 1958) the Court observed that Hobbs Act definitions are copied from the New York Code and are subject to the construction of the New York penal laws by the New York courts. New York courts have construed robbery to be the unlawful taking of personal property from the person or in the presence of another, against his will,

by means of force, or violence, or fear of injury, immediate or future, to his person or property.

According to New York courts, to constitute robbery, the force or fear must be employed either to **obtain or retain** possession of the property or to overcome resistance to the taking. New York courts have ruled that intent, asportation or carrying away are elements of robbery which must be established for a conviction to stand. **U. S. v. Nedley, supra.**

In the case at bar, necessary elements of robbery were absent as far as Defendants DARA and FARINELLA were concern[illegible].

There is no testimony that either Defendant DARA or FARINELLA had any intent to steal. No testimony discloses knowledge on the part of either DARA or FARINELLA as to what was going to transpire. In fact, these defendants were acquitted of the conspiracy charge, negating any inference of awareness by them of Esperti's purpose.

The entire incident involved DARA's returning to the room with $2,000 saying "Look what I found", while Defendant FARINELLA said nothing. The money was handed to Esperti. No force or fear was used to obtain or retain the money, as required to be proved, nor was the money obtained or retained by either Defendant FARINELLA or DARA.

Ownership of the allegedly stolen funds was not established. Testimony disclosed that the money may have belonged to Red Ball or it may have belonged to Maloney,

who was not a shareholder; to avoid difficulty the Government stated in its charge that the money belonged to both the Corporation and to Maloney, but failed to prove actual ownership.

In addition to proving a robbery occurred, the Government was required to prove that commerce was affected. **Stirone v. U. S., supra.**

Maloney testified that shipments of merchandise were made following the events of September 13, 1966 (T. 240) and that the business continued in operation (T. 247) until it went into bankruptcy the following February. No testimony disclosed that commerce was in any way obstructed (T. 296). Interpreted in the manner of the present case, the Hobbs Act serves only to make any act of robbery, normally a state violation, a federal crime, contrary to the existing interpretations in other circuits requiring some effect on commerce. **United States v. Critchley,** 355 F.2d 358 (3rd Cir. 1965).

The Government alleged that Maloney was preparing a deposit slip for a $2,000 cash bank deposit received via Western Union for a sale to a Chicago customer, and the funds with which the Defendants departed represented the proceeds of a sale. If that were so, all commerce had been concluded, and any robbery occurred as a state violation and could not have affected commerce.

The appellate court held that "It is clear that the taking of $2,000 from a business engaged in interstate commerce would obstruct, delay or affect commerce." It is respectfully submitted that the articles involved, and the proceeds had concluded all interstate travel and that

therefore no effect on commerce resulted. Waldorf testified that the visit had no effect on the shipping of merchandise.

The Court erred when it charged the jury that if it inferred the Government had established a robbery, that robbery in some way or degree obstructed, delayed or affected commerce (T. 1062). Not every robbery affects commerce. Unless the charge included the requirement that the jury also had to find that Red Ball Merchandising was engaged in commerce, one of the material elements establishing jurisdiction was omitted. It is respectfully submitted that, based on the facts which indicated that all commerce had ceased and only the local proceeds were involved, the jury could have reached a different conclusion under an instruction bringing the commerce requirement to their attention.

The case at bar is distinguishable from **Battaglia v. U. S.**, 383 F.2d 303 (9th Cir. 1967). There the Court found that although a pool table had terminated its travel in interstate commerce, a Hobbs violation occurred because the wrongful act prevented use of articles after shipments. In the case at bar, no use was prevented.

II

DOES ATTEMPTED EXTORTION AFFECT COMMERCE SUFFICIENTLY TO VIOLATE THE HOBBS ACT?

Attempted extortion does not affect commerce sufficiently to violate the Hobbs Act.

Elements required to be proved in violation of the Hobbs Act by extortion include wrongful use of actual or threatened force, violence, or fear, and an effect on commerce.

Extortion is defined under the Act as:

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

In **U. S. v. Kubachi**, 237 F.Supp. 638 (1965) the Court commented that in extortion cases the victim is compelled to pay for the exercise of a right or privilege already his under threat and out of fear that if he does not comply with the demands he will be subjected to unwarranted interference.

In the case at bar, no such threat was made by Defendant DARA or FARINELLA. The only statement concerning the allegedly extorted $25,000 was the statement by Esperti that "we're here to get the other $25,000 for the man in New York." That statement was made in DARA's absence, and its admission against DARA violates existing law. **Bruton v. United States**, __ U.S. __ 20 L.Ed.2d 476. Later Esperti said "That don't count toward the $25,000." FARINELLA added "You've got a lot of merchandise out there. Sell it. Get the money."

It is difficult to determine exactly what words or deeds constituted the threat labeled extortion. As interpreted by the government in the present case, attempted

robbery and attempted extortion appear to be indistinguishable!

Although guns were present at the meeting cited above, it is impossible to say what the witnesses could have expected or feared if they did not comply with the demands. The consent required in the definition of extortion under the Hobbs Act was certainly absent here. No attempt was made to indicate to whom a threat was made, that is whether the victim of the extortion was an individual present, all individuals, or the corporation. **U. S. v. Critchley, supra.**

There is no basis for concluding that the mere attempt at extortion charged in the indictment did in fact delay or obstruct commerce. That conclusion appears to be an impossibility of fact, if not of law. The defect arises from the careless language in the indictment reversing the order of the words of the statute so as to destroy any semblance of logic.

The indictment, for instance, talks about "efforts" being induced by force, rather than "payment" being induced.

The indictment alleges consent, but the facts indicate that consent was never requested or given and in fact had to be absent to meet the requirements of robbery.

The Hobbs Act condemns an attempt to delay commerce by robbery or extortion. In the indictment, the words are transposed to include attempted extortion, without regard to the fact that attempted extortion could not result in a completed obstruction of commerce.

This is so not only because the act in itself must be incomplete to constitute an attempt, but also because any threat would relate to events to occur in the future and could not have a present effect on commerce.

The Court, therefore, erred when it charged the jury that the natural effect of finding extortion, or attempted extortion, would be to find an effect on interstate commerce (T. 1067).

The Court also erred when it charged the jury that if the Government had established an attempted extortion, the extortion would have obstructed, delayed or affected commerce in some way had it been successful. This charge amounts to sheer speculation.

In order to meet the charges of robbery and attempted extortion alleged in the indictment, the Government resorted to hearsay testimony. Since the conspiracy charge was dismissed, such testimony severely prejudiced Defendants DARA and FARINELLA, in that the bulk of the testimony did not relate to the charges against these defendants and occurred after the conclusion of the events alleged. Throughout the trial statements of persons not made in furtherance of a conspiracy or in the presence of the defendants were admitted, depriving defendants of a fair trial as well as the right of confrontation when those persons were also co-defendants.

The vast bulk of the record concerns subsequent events involved in a conspiracy charge of which Petitioners were acquitted.

It would appear that the technic of the government in multi-defendant conspiracy cases, of failing to prove the existence of a conspiracy prior to using the hearsay exception permitted in conspiracy cases, limits or deprives an individual of the fair trial constitutionally guaranteed. It is respectfully suggested that the inclusion of masses of testimony creates an emotional reaction which must spill over in the jury's mind to that minor phase of the testimony which concerns the substantive counts.

It is impossible to say whether there would have been a conviction on Counts II and III if the testimony had been limited to these counts. This problem would be avoided if the government were required to prove the existence of the conspiracy first, before the bulk of hearsay testimony is permitted. The jury must find the existence of a conspiracy before determining the extent of the conspiracy. The government should be barred from bringing in the second phase of a conspiracy charge until its existence is first proved.

CONCLUSION

The decision of the Fifth Circuit conflicted with decisions in other circuits concerning elements required to be proved. The appellate court sanctioned a departure from existing evidentiary procedure by admitting hearsay testimony not in furtherance of a conspiracy, and in charging the jury.

It is respectfully submitted that the questions raised by Petitioners are important questions of federal law and the Hobbs Act, and should be settled by this Court.

Petitioners, therefore, respectfully urge this Court to grant Petition for Writ of Certiorari.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioners
1674 Meridian Avenue
Miami Beach, Florida 33139

By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to William G. Earle, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida 33101 and Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, this ____ day of March, 1969.

APPENDIX

APPENDIX

APPENDIX A

COUNT II

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully, obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movements of articles and commodities in commerce, by robbery, in that the Defendants named herein did obtain from John Edward Maloney and the Red Ball Merchandising Corporation, against their will, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, amounting to $2,000, in currency, payment of which was obtained by means of immediate actual and threatened force, violence and fear of injury.

2. At all times pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandising Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the state of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code 1951.

COUNT III

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movement of articles and commodities in commerce, by extortion, in that the Defendants named herein did attempt to obtain from John Edward Maloney and the Red Ball Merchandising Corporation, with their consent as such, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, in the amount of $25,000, efforts to obtain payment being induced by the wrongful use of actual and threatened force, violence and fear.

2. At all times pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandising Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the State of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code.

APPENDIX B

(Style and Number Omitted) (Filed August 16, 1967)
R. 1240

JUDGMENT AND COMMITMENT AS TO SAM NICK FARINELLA

On this 16th day of August, 1967, came the attorney for the government and the defendant appeared in person and by counsel, Steadman Stahl, Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951, as charged in Counts 2 and 3 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS as to Count 2, or until otherwise discharged by due process of law, and TEN (10) YEARS as to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that sentence imposed as to Count 3 shall run concurrently with sentence hereinabove imposed as to Count 2.

/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE

* * *

(Style and Number Omitted) (Filed August 16, 1967)
R. 1241

JUDGMENT AND COMMITMENT AS TO WILLIAM JOSEPH DARA

On this 16th day of August, 1967 came the attorney for the government and the defendant appeared in person and by counsel, Steadman Stahl, Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951, as charged in Counts 2 and 3 of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVEN AND ONE-HALF YEARS (7-½) as to Count 2, or until otherwise discharged by due process of law, and SEVEN AND ONE-HALF (7-½) YEARS as to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that sentence imposed as to Count 3 shall run concurrently with sentence hereinabove imposed as to Count 2.

/s/ W. O. MEHRTENS
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25194

ANTHONY ESPERTI,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25233

SAM NICK FARINELLA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25234

WILLIAM JOSEPH DARA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

(January 13, 1969)

Before BELL and MORGAN, Circuit Judges and GUINN, District Judge.

GUINN, District Judge: Defendants Dara, Farinella and Esperti appeal from conviction on two counts of violation of the Hobbs Act, 18 U.S.C. Sec. 1591[1] the first anti-racketeering statute passed by Congress. Dara received concurrent seven and one-half years on each count. Farinella and Esperti each received concurrent ten year sentences.

On appeal the facts must be considered most favorably to the Government to support the verdicts. *Glasser v. United States*, 315 U.S. 60 (1942).

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[1]§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

John Maloney and Joseph Yeager were fifty percent profit-sharing partners in the Red Ball Merchandising Corporation in Hialeah, Florida. Red Ball sold close-out merchandise. Its interstate sales and purchases amounted to ninety percent of its business.

On September 13, 1966, at 4:00 P.M., Maloney was in his office at Red Ball preparing a deposit slip for a $2000 cash bank deposit received via Western Union for a sale to a Chicago customer. The cash was in $100 bills. Maloney left his office and entered Yeager's office where he saw, for the first time in his life, the three appellants. Esperti and Farinella each had guns. Yeager and an employee, William Waldorf, were also in Yeager's office. Esperti's gun was pointed at Yeager and Farinella's at Waldorf.

Esperti grabbed Maloney, threw him on the couch and told him that, "We're here to get the other $25,000.00 for the man in New York." Esperti put the gun alternatively against Maloney's and Yeager's heads and demanded the $25,000 immediately. Meanwhile Dara left the room and reentered with the deposit slip and the $2000 Maloney had been preparing to put in the bank. He said, "Look what I found" and Esperti took it from him adding, "That don't count toward the $25,000." Farinella added, "You've got a lot of merchandise out there. Sell it. Get the money." They left with the $2000. Yeager kept inquiring to whom Red Ball owed the money. This angered Esperti and he hit Yeager.

Two months later Dara and Maloney met at the Shalimar Restaurant and Dara said that he had received

a call from New York City to collect some money from Yeager. Defense counsel were unable to establish that Maloney or Red Ball or Yeager owed any individual any sum of money.

Defendants were acquitted of Count I, a conspiracy charge. They were also acquitted of two remaining substantive counts concerning events of the following day which are not pertinent here.

The first question presented is the sufficiency of the indictment. The indictment satisfies the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. It is drafted substantially in the words of 18 U.S.C. Section 1951. See *United States v. Green*, 350 U.S. 415 (1956); *United States v. Debrow*, 346 U.S. 374 (1953); *Turf Center v. United States*, 325 F.2d 793 (9th Cir. 1963).

The next question presented is the sufficiency of the evidence to show that the Defendants robbed Red Ball Merchandising Corporation of $2000 as defined in the Hobbs Act. The evidence is sufficient and establishes that $2000 was taken unlawfully from the Red Ball personnel against their will by means of the threatened force of the guns brandished by Farinella and Esperti. It is clear that the taking of $2000 from a business engaged in interstate commerce would obstruct, delay or affect commerce. *United States v. Provenzano*, 3 Cir. 1964, 334 F.2d 678, 692, cert. denied, 379 U.S. 947 (1964); *United States v. Tolub*, 2 Cir. 1962, 309 F.2d 286, 288; *United States v. Kramer*, 7 Cir. 1966, 355 F.2d 891, 898.

The next contention made by the Defendants is that the attempted extortion and consummated robbery did not obstruct, delay or affect commerce. This contention is without merit. Once the robbery and attempted extortion of Maloney and Red Ball was established, it was not necessary to show that any particular shipment of merchandise moving to and from Red Ball was obstructed or delayed. It is a depletion of the resources of the business which permits the reasonable inference that its operations are obstructed or delayed. *United States v. Provenzano*, Supra.

The Defendants also contend that the witness Maloney should have not been permitted to refresh his recollection with a copy of a statement given by him to an agent of the FBI. It is hornbook law that any writing may be used to refresh the recollection of a witness. See Wigmore, *Evidence* §758. This is true even where the document itself would be inadmissible as evidence. *Williams v. United States*, 7 Cir., 1966, 365 F.2d 21. Caution must be exercised to insure that the document is actually being used for purposes of refreshing and not for purposes of putting words in the mouth of the witness. Such, however, is within the discretion of the trial judge. *Williams*, supra. There was no abuse of this discretion here.

Defendants also object to the trial court's failure to grant motions for severance and the allowance into evidence of certain hearsay testimony. Both these objections relate to alleged bribery and obstruction of justice issues which may not have been equally applicable to all defendants. Defendant Esperti contends that the refusal to sever and the allowance of the hearsay were particularly harmful to him. Esperti, however, joined in a motion to open

up this entire area over the objection of the government and the advice of the court, and he cannot now be heard to complain of prejudice resulting therefrom.

We have examined the defendants' objections to the court's jury charges including those on reasonable doubt and substantial evidence and the court's refusal to admit into evidence the actual tapes of the alleged bribe attempts, and we find them all without merit.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25233

D. C. Docket No. 67-1-CR-WM

SAM NICK FARINELLA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before BELL and MORGAN, Circuit Judges, and GUINN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 13, 1968

Issued as Mandate:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25234

D. C. Docket No. 67-1-CR-WM

WILLIAM JOSEPH DARA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before BELL and MORGAN, Circuit Judges, and GUINN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 13, 1968

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25,233 and 25,234

SAM NICK FARINELLA and WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing of Appeal from the United States District Court for the Southern District of Florida

---

COMES NOW the Appellants, SAM NICK FARINELLA and WILLIAM JOSEPH DARA by their undersigned attorneys and file this Petition for Rehearing and as grounds for such Petition, say:

1. The Court overlooked and failed to consider the total absence of any evidence indicating interference with interstate commerce. The mere existence of interstate transactions by a corporation does not prove that anything done relating to that corporation interfered with interstate commerce. The positive evidence discloses the contrary.

2. The Court overlooked and failed to consider the fact that the importance of the $2,000 items required the granting of Appellants' full right to cross-examination of witnesses concerning that $2,000. That right was infringed upon and limited by the Court yet the option of January 13, 1969, of this Honorable Court reflects the importance of the testimony concerning the $2,000.

3. The Court failed to consider the fact that the finding of not guilty on the conspiracy charge required a finding of not guilty of the substantive count. The Court further overlooked and failed to consider that the absence of any evidence supporting the conspiracy count as to these Appellants rendered the admission of testimony concerning that count prejudicial to the rights of Appellants to a calm, unemotional consideration of the facts concerning the charges upon which the guilty judgment was entered. The bulk of the record concerned the conspiracy charge upon which the Defendants were acquitted. The Court overlooked and failed to consider the fact that if the government had been required to prove the existence of a conspiracy before introducing the prejudicial testimony not related to the creation of the conspiracy itself, fair trial could have been afforded Appellants. Under the circumstances, however, prejudice necessarily resulted.

For the foregoing reasons Appellants respectfully request reconsideration and rehearing of these proceedings.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellants
1674 Meridian Avenue
Miami Beach, Florida 33139

By_____
MILTON E. GRUSMARK

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to WILLIAM G. EARLE, c/o U.S. ATTORNEY, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida 33101, Attorney for Appellee, on this — day of January, 1969.

_____
MILTON E. GRUSMARK

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25233 and 25234

SAM NICK FARINELLA and
WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING
(February 6, 1969)

Before BELL and MORGAN, Circuit Judges, and GUINN, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
February 14, 1969

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, LA. 70130
Tel. No. 527-6514

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Re: NO. 25233 & 25234—
Sam Nick Farinella and William Joseph Dara
vs. U. S.

Gentlemen:

The following action has this day been taken in the above case:

(X) An extension of time has been granted to and including March 8, 1969
- ( ) for filing and docketing record on appeal.
- ( ) for payment of Court costs.
- ( ) for withdrawing record for printing.
- ( ) for filing appellant's printing designation.
- ( ) for filing appellee's printing designation.
- ( ) for filing reproduced copies of the record.
- ( ) for filing appellant's brief.
- ( ) for filing appellee's brief.
- ( ) for filing a petition for rehearing.

( ) The Court's opinion has this day been rendered and a copy thereof is enclosed.

( ) Joint Motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

(X) Motion for Stay of Mandate has this day been granted to and including March 8, 1969.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By G. E. WINDHORST, JR.
Deputy Clerk

REWJr:bc
cc: Mr. Steadman S. Stahl
Mr. William G. Earle
Milton S. Grusmark, Esq.